Nos. 83-141 and 83-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

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MOTIONS TO AFFIRM

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QUESTIONS PRESENTED

Appellees respectfully submit that the only questions properly before this Court are the following:*

1. Whether a state statute providing for a taking by eminent domain of the fee simple title of lessors' lots for the immediate transfer of that title to lessees violates the "public use" requirement of the Fifth and Fourteenth Amendments to the Constitution of the United States, where that taking (a) can be performed only at the behest of the individual lessees already owning homes situate upon the lots; (b) applies only to the specific lots of which the lessees have applied and for which the lessees themselves pay the amount awarded upon condemnation; (c) does not change the use, usability, possession, or occupancy of the lots taken, or their environs, but instead simply transfers title to the applicant lessees; (d) involves the State only as the conduit for the transfer of title; and (e) does not establish any restriction of any kind upon the lessees' right to impose restraints upon the further alienation of those lots once the lessees have obtained title.

2. Whether the courts below did not correctly assume jurisdiction over the constitutional questions presented where:

(a) under the *Pullman* doctrine, (i) no party had raised this doctrine in the Court of Appeals; and (ii) the state eminent domain statute at issue clearly stated that

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* The various appellants in Nos. 83-141, 83-236 and 83-283 cannot agree as to what the Questions Presented are and have set forth three different sets of such questions. *See* the Jurisdictional Statement of the Hawaii Housing Authority *et al.* (hereinafter "HHA JS"), at i; the Jurisdictional Statement of the Kahala Community Association *et al.* (hereinafter "Kahala JS"), at 1; and the Jurisdictional Statement of the Portlock Community Association *et al.* (hereinafter "Portlock JS"), at i.

any exercise of the state's eminent domain authority "is for a public use and purpose," thus leaving no room for ambiguity or a different state court interpretation;

(b) under the *Younger* doctrine, (i) the State never claimed at any time throughout the proceedings in both lower courts that *Younger* was applicable and, to the contrary, affirmatively sought a federal judicial decision on the merits; (ii) private parties cannot assert *Younger* abstention; and (iii) there were no pending state court proceedings either at the time this suit was brought or at the time the federal District Court issued a temporary restraining order and later a partial preliminary injunction against the enforcement of the challenged state law;

(c) under the *Burford* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) appellees raised substantial federal constitutional claims under 42 U.S.C. § 1983 in their complaint; (iii) there was no question of whether the State had the purported authority, under state law, to condemn appellees' property; and (iv) the State had not established a specialized court system to resolve state condemnation suits; and

(d) under the *Colorado River* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) there was no federal statute counseling in favor of state court litigation; (iii) plaintiffs' claims were based upon federal law; (iv) the federal suit preceded the filing of any state court suit; (v) abstention would inevitably have led to piecemeal litigation; and (vi) there was no inconvenience to the parties in litigating this case in federal court.**

** If probable jurisdiction is noted, appellees will also address the following questions which were presented to, but did not have to be decided by, the Court of Appeals:

3. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by impermissibly

delegating to private parties the right to exercise the sovereign power of eminent domain.

4. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by failing to have as a sustaining legislative purpose anything other than a bare desire to harm a politically unpopular group of landowners within the state.

5. Whether the state statute described in Question 1 violates the Contract Clause of Article I, § 10, of the Constitution as applied to leases executed prior to its initial enactment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	vi
STATEMENT	2
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. THE COURT OF APPEALS' NARROW DECISION IS MANIFESTLY CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS ON PUBLIC USE	16
II. THE COURT OF APPEALS' JUDGMENT IS INDEPENDENTLY SUPPORTED BY SETTLED DUE PROCESS AND CONTRACT CLAUSE DOCTRINES	25
A. The Due Process Clause	25
B. The Contract Clause	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978)	28, 29
Berman v. *Parker*, 348 U.S. 26 (1954)	23, 24
Brown v. *United States*, 263 U.S. 78 (1923)	17, 24
Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) (Chase, J.)	16
Chicago, Burlington & Quincy R.R. Co. v. *Chicago*, 166 U.S. 226 (1897)	16, 17
Cincinnati v. *Vester*, 281 U.S. 439 (1930)	22
Cole v. *LaGrange*, 113 U.S. 1 (1885)	17
Cooper v. *Aaron*, 358 U.S. 1 (1958)	22
Davis v. *Finance Realty*, No. 4735 (Haw. Sup. Ct.)	10
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 103 S. Ct. 697 (1983)	28, 29
Eubank v. *City of Richmond*, 226 U.S. 137 (1912)	25, 26
Exxon Corp. v. *Eagerton*, 103 S. Ct. 2296 (1983)	28, 29
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112 (1896)	17, 22
Fuentes v. *Shevin*, 407 U.S. 67 (1972)	27
Guam v. *Moylan*, 407 F.2d 567 (9th Cir. 1969)	24
Hairston v. *Danville & Western Ry. Co.*, 208 U.S. 598 (1908)	22
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934)	29
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979)	21
Lochner v. *New York*, 198 U.S. 45 (1905)	20
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)	27
Loretto v. *Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982)	21, 22
Madisonville Traction Co. v. *St. Bernard Mining Co.*, 196 U.S. 239 (1905)	14, 17
Marburg v. *Mercantile Bldg. Co.*, 140 A. 836 (Md. 1928)	21
Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.)	17
Midkiff v. *Hasegawa*, No. 4727 (Haw. Sup. Ct. 1967)	10

TABLE OF AUTHORITIES—Continued

Page

Midkiff v. *McCormick*, No. 4728 (Haw. Sup. Ct. 1967) 10
Miller v. *Schoene*, 276 U.S. 272 (1928) 20
Missouri Pac. Ry. Co. v. *Nebraska*, 164 U.S. 403 (1896) 17
Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 27
Nectow v. *City of Cambridge*, 277 U.S. 183 (1928).. 27
Pacific Gas & Electric Co. v. *State Energy Resources Conser. & Dev. Comm'n*, 103 S. Ct. 1713 (1983) .....
Parratt v. *Taylor*, 451 U.S. 527 (1981) 27
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 20
People of Puerto Rico v. *Eastern Sugar Assoc.*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946) 24
Poletown Neighborhood Council v. *City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) 24
Rindge Co. v. *Couty of Los Angeles*, 262 U.S. 700 (1923) 18, 21
State v. *Anderson*, Civil No. 43937 (Haw. Cir. Ct. 1975) 10
Stewart v. *Gorter*, 16 A. 644 (Md. 1889) 21
Texas, Inc. v. *Short*, 454 U.S. 516 (1982) 21
Thompson v. *Consolidated Gas Util. Corp.*, 300 U.S. 55 (1937) 14, 17, 18
United States v. *Carmack*, 329 U.S. 230 (1946).... 17
United States v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896) 19
United States v. *New Mexico*, 438 U.S. 696 (1978).. 23
United States v. *Security Indus. Bank*, 103 S. Ct. 407 (1982) 21
United States Dep't of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 28
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 28, 29
Washington ex rel. Seattle Title Trust Co. v. *Roberge*, 278 U.S. 116 (1928) 25, 26

TABLE OF AUTHORITIES—Continued

	Page
Zobel v. *Williams*, 457 U.S. 55 (1982)	28
Wilson v. *Iseminger*, 185 U.S. 55 (1902)	21
Constitution:	
Article I, § 10	28, 29
Fifth Amendment	*passim*
Fourteenth Amendment	14
Statutes:	
Haw. Rev. Stat. ch. 171	8
Haw. Rev. Stat. ch. 516	*passim*
Haw. Rev. Stat. ch. 519	4
1968 Haw. Sess. Laws Act 46	10
1971 Haw. Sess. Laws Act 215	8
1975 Haw. Sess. Laws Act 186, § 1	9
Treatises:	
Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351	16, 17
2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* (rev. 3d. 1981 & Supp. 1982)	17, 18, 22
Stoebuck, *A General Theory of Eminent Domain*, 47 Was. L. Rev. 553 (1972)	17, 18
Other:	
Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800	5, 18
Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859	5, 18
Construction in Hawaii	3
The State of Hawaii Data Book	3

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MOTIONS TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Frank E. Midkiff, *et al.* (hereinafter "Trustees"), move that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed on the ground that the judgment is plainly correct and the challenge to it so insubstantial as to warrant no further review.

STATEMENT[1]

A. Trustees and the Affected Leaseholds

Trustees administer the Will of Princess Bernice Pauahi Bishop, great-granddaughter and last lineal descendant of Kamehameha the Great, the first monarch of Hawaii. The nucleus of her Will was a perpetual charitable trust[2] for the establishment and support of the Kamehameha Schools. The Schools provide a wide array of educational services for children of Hawaiian ancestry in kindergarten through high school, in addition to scholarships and other grants for post-high school education. The Schools also reach a broad segment of the Hawaiian community through their Extension Education Division and programs for public school students.

After her death in 1884, the Princess' estate consisted of lands (mostly inherited from other members of the Royal Family) which now comprise about 9% of the land area in Hawaii. Much of this land is inaccessible or otherwise unusable, *e.g.*, in lava fields and watershed areas. These lands, together with those zoned and used for agriculture, comprise nearly 98% of Trustees' land holdings. Less than 3% of the trust lands are devoted to residential, resort and commercial use, and the income generated from these lands provides nearly the sole support for the Schools.

Leasing of residential lots in Hawaii did occur prior to World War II, but there were relatively few leaseholds as compared to lots owned in fee simple by households. The number of leasehold lots substantially increased after

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[1] Trustees have filed a separate Motion to Affirm in *Portlock Community Association* v. *Midkiff*, No. 83-236, and incorporate by reference the Statement and following discussion contained therein. These Motions are addressed to appellants' Public Use requirement arguments. We respond to appellants' abstention arguments in our Motion to Affirm in No. 83-236.

[2] Pursuant to direction of the Will, successor trustees are appointed by the Justices of the Supreme Court of Hawaii.

World War II as a result of heavy demand for single family residences and the need to meet that demand with minimum capital expenditure by the families requiring new housing. The practice of leasing, rather than selling, residential lots in newly-developed subdivisions arose mainly from (a) the inability of most of the market (primarily veterans and other young people) to pay for *both* the fee simple title to the lot *and* the residence upon the lot, (b) the fact that most new lots were developed on land owned by relatively large landholders [3] who had held the land for decades, had an extremely low "basis," and would have had to pay ordinary income tax on nearly 100% of fee simple sale proceeds as "dealers," [4] and (c) restrictions inhibiting sales in the trust instruments of some of these large landholders. The developers of many small subdivisions, who were not inhibited by tax reasons or trust restrictions, also leased rather than sold residential sites because of the limited financial capabilities of prospective occupants. Notwithstanding these leaseholds, fee simple ownership was always, and is, the prevalent method of residential landholding in Hawaii.[5]

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[3] Most, but by no means all. Many subdivisions of fewer than 100 lots were developed and leased by owners of small tracts. These subdivisions, too, are impacted by the statute.

[4] Trustees, who are in this group, also had to be concerned with protecting the status of the trust as a tax exempt organization.

[5] On the Island of Oahu, as of January 1, 1982, there were 72,839 owner-occupied units (single *and* multi-family) where the land was owned in fee simple, as compared with 35,539 leasehold units. *The State of Hawaii Data Book*, table 486 (1982). Cumulative statistics covering single-family units alone have not been published. Figures are available for recent sales and show that fee simple sales have heavily predominated over leasehold sales of newly developed units. In 1981, for example, on Oahu, 69% of newly-built single-family units were on land sold with the residence in fee, and 31% were on land leased to the purchaser of the residence. *Construction in Hawaii* (Bank of Hawaii, 1982). Virtually all of the residential leaseholds affected by Chapter 516 are located on the Island of Oahu.

Since the 1950's, most of Trustees' leases have been on FHA and VA approved forms to permit lessees to finance purchase of their homes through mortgages with FHA or VA guarantees. A typical lease has a term of 55 years, with annual rental fixed for the first 30 or 40 years at a constant amount. Upon expiration of the initial fixed rental period, lessor and lessee renegotiate a new rent based upon a percentage of a statutority limited portion of the market value of the land, exclusive of the value of structures on the land. Almost all leases provide for arbitration of conflicting views, and the amount of rent that can be charged on the reopening of the stipulated rental is restricted by legislation.[6] Lessees may freely assign and mortgage their leases.[7] The majority of Trustees' residential leases in effect at the onset of this litigation were executed prior to the enactment of Chapter 516.

B. The Statute

It should be noted at the outset that the bulk of the findings relied upon by appellants were not even part of the original statute.[8] They were not adopted until 1975,

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[6] Fixed at 4% of a legislatively defined "owner's basis" which drastically reduces the value of Trustees' interest in the lots. Haw. Rev. Stat. § 519-2.

[7] All of these provisions of the leases are further amplified and assured by the "Lessees' Bill of Rights," not in issue in this litigation. Part III of Chapter 516, Haw. Rev. Stat. §§ 516-61 through 70 (HHA JS App. A132-136). It applies to all residential lots under long-term lease, and guarantees the right to assign; the opportunity to cure default; the right to extend to a remaining term of 55 years, a formula for determining rent upon extension; and other rights. Part III *does not restrict* the lessee-acquirers, *i.e.*, persons acquiring the lessors' interest under the statute, or protect lessees under leases made by those persons unless the new leases are for periods of 20 years or longer.

[8] It is significant that none of the appellants included in their Appendices *any* legislative history—an inclusion which they would have been expected to make in view of their reliance upon legislative findings. The reason for their omission is that the legislative history simply did not include the type of support that ordinarily precedes important legislation of the type encountered here.

in an attempt to bolster the constitutionality of the Act after the Hawaii Attorney General had brought suit to have the Act declared unconstitutional on the ground, among others, that it failed to satisfy the Public Use requirement of the Eminent Domain Clause.[9] As the Court of Appeals properly recognized, the findings were mere rationalizations for a clearly private taking.

The true objective of the statute was exposed at its inception, when it was described as a vehicle "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots." [10] The statute's private purpose is indeed evident throughout its provisions,[11] which, briefly summarized, are:

(a) The statute applies to residential lots, located in "development tracts," held under leases for terms of twenty years or more.[12] "Development tracts" are defined as not less than five acres in size.[13]

(b) Proceedings to take the fee simple title to lots may never be commenced on the state's initiative, but may be commenced *only* if and after lessees of at least 25 lots or 50% of the lots (whichever is less) in a development

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[9] The suit was not pursued to judgment on the merits. *See* note 36, *infra*.

[10] Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859.

[11] Some of these provisions were declared unconstitutional by the District Court. *See* notes 17, 18, and 40, *infra*. The statute was changed by amendments enacted subsequent to the filing of the complaint. These amendments do not affect the issues presented on this appeal: 1979 Haw. Sess. Laws, Act 227, 1980 Haw. Sess. Laws, Acts 39 and 107, and 1983 Haw. Sess. Laws, Acts 203, 204, and 270. *See* notes 17 and 18, *infra*.

[12] Haw Rev. Stat. §§ 516-21, 516-1(5) & (11).

[13] Haw. Rev. Stat. § 516-1(2). Most residential lots are 6,000 to 12,000 square feet in area. Allowing for streets, not more than six lots can be developed per acre.

tract have applied to the HHA to purchase the fee interest in their lots.[14] Expenses incurred by the HHA in the proceedings are to be paid by the applying lessees, who are required to forward a deposit for that purpose.[15] The HHA may acquire the fee interest in all or some of the lots in a tract when, after a hearing, it finds that such acquisition will effectuate the purposes of the statute.[16] Since the only purpose to be effectuated is to place the ownership of the lots in the hands of the lessees, the HHA's hearing and resulting findings are ministerial in nature, as evidenced by experience under the statute to date.

(c) After the public purpose "determination," the HHA instructs the lessor of the lots and the lessees to negotiate the "just compensation which the lessees will pay" for the fee simple title. If the parties fail to agree, the HHA directs the parties to commence compulsory arbitration.[17] Statutory formulae are provided for determination of compensation.[18]

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[14] Haw. Rev. Stat. § 516-22.

[15] Haw. Rev. Stat. § 516-33.5.

[16] Haw. Rev. Stat. § 516-22. Since the HHA need not acquire all lots in the development tract, lots are designated for acquisition in a checkerboard pattern based solely upon the wishes of individual lessees who desire and are financially able to purchase fee title to their lots.

[17] Haw. Rev. Stat. Chapter 516, Part IIA, §§ 516-51 through 516-55. The compulsory arbitration provisions of this part were declared unconstitutional by the District Court, and the HHA was permanently enjoined from taking further action with respect to this statutory provision. No appeal was ever taken from this ruling. *See* note 40, *infra*. After this ruling, the legislature amended the statute to repeal the compulsory arbitration provisions and to provide for a mandatory negotiation. The validity of this amendment and the amendment mentioned in note 18, *infra*, remains to be tested, but are immaterial if Part II of the statute (Haw. Rev. Stat. §§ 516-22 through 45) is declared unconstitutional by this Court.

[18] Haw. Rev. Stat. §§ 516-1(14) and 516-24. Exclusive use of these formulae was ruled unconstitutional by the District Court. *See* note 40, *infra*. After this ruling, and purportedly in compliance

(d) The HHA obtains from applicant lessees information verifying that they are "qualified" [19] to purchase the lessor's fee simple title and financial statements or evidence demonstrating their ability to pay the probable prices at which fee simple titles to their lots will be acquired and transferred to them through the condemnation proceedings.[20] The HHA then "designates" for acquisition and thereafter institutes a condemnation action against the lots for which qualified lessees have applied.[21] While the HHA is the nominal party plaintiff, the lessees, as the real parties in interest, are named (along with the lessor) as parties defendant.[22] Upon conclusion of the condemnation proceedings, the fee simple title to the lots is transferred to the applicant lessees upon their payment of the awarded compensation.[23] The remaining lots in the development tract are not involved

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with it, the legislature amended the statute to preclude sole reliance upon the formulae. 1980 Haw. Sess. Laws, Act 107, § 2 (codified at Haw. Rev. Stat. § 516-1(14)).

[19] Haw. Rev. Stat. § 516-33. Among other requirements, the applicant lessee must be the owner of the residence upon the leased premises and have a bona fide intent to live in the development tract *or be a resident of the state of Hawaii.* Haw. Rev. Stat. § 516-33(2). The legislature thus gave its tacit approval to use of Chapter 516 for speculative purposes, by its recognition that many lessees would not reside in the purchased premises but would instead rent, lease, or sell the same.

[20] Haw. Rev. Stat. § 516-33(4).

[21] Haw. Rev. Stat. §§ 516-22 and 23.

[22] According to the HHA, the lessees are named as defendants because they "have a direct interest in the amount of compensation and damages, if any, to be awarded * * *, in that said amount will ultimately be borne by the lessees who purchase the houselots * * *." *E.g.*, Complaint, ¶ 3, filed in 1980 in *Hawaii Housing Authority* v. *Midkiff*, Civil No. 60465 (Haw. Cir. Ct.), a copy of which is attached as Exhibit "A" to Trustees' Memorandum in Opposition to Motion for Partial Summary Judgment, filed in the District Court (Record, at 158).

[23] Haw. Rev. Stat. § 516-30.

in the statutory proceedings, but may be substantially affected in fact.

(e) Funds to satisfy the condemnation award are supplied entirely by the lessees. While the statute authorizes state bonds to be issued and funds to be appropriated for HHA acquisitions, no bonds have been issued in the 16 years of the statute's existence, and only token funds have been appropriated.[24]

(f) Part III of the statute, often referred to as the "Lessees' Bill of Rights," is not at issue in this litigation. It should be noted, however, that Part III *does not restrict* the lessee-acquirers from reimposing the same long-term leaseholds the legislature has supposedly found so harmful, or protect new lessees under their new leases unless the new leases are for periods of 20 years or longer.[25]

(g) Part IV of the statute sets out legislative findings and declarations, adopted in 1975 when the legislature sought to strengthen the statute's claims to constitu-

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[24] The first attempt to provide public financing occurred in 1971 Haw. Sess. Laws, Act 215, which authorized the issuance of $5,000,000 in general obligation bonds. As noted below (*see* note 36, *infra*), the Hawaii Attorney General challenged the constitutionality of the Act and use of public credit to finance acquisitions. The bonds were never issued. In 1975, the legislature appropriated $1.3 million for a test case aimed at a small subdivision. The test case was settled, and this money remains unspent.

[25] Haw. Rev. Stat. §§ 516-61 and 516-1(5). Indeed, other state statutes providing for disposition of public lands make it apparent that there is not now and never has been any government policy against the practice of leasing for a long period, whether of residential or other lands. Disposition of public lands is *required to be by lease only* unless otherwise specifically authorized. Haw. Rev. Stat. § 171-32. Leasing of public lands for residential purposes is specifically authorized by Haw. Rev. Stat. §§ 171-44, 171-45, 171-60, 171-72 and 171-93. Statutory requirements concerning the provisions of leases of public lands make such leases more restrictive than those made by private landowners who have conformed their lease form to FHA requirements.

tional legitimacy.[26] These *inter alia* recite a concentration of land ownership in a few hands;[27] claim that the practice of leasing rather than selling has resulted in a shortage of "fee simple residential land";[28] refer to the high cost of land and the need to check the "inflationary trend of land;"[29] and assert the right of the state to "exercise the power of eminent domain" for the purpose of "allowing lessees under long-term leases of residential land to purchase * * *"[30]

Further emphasizing the private purposes of the statute is its history of amendments, which have progressively facilitated the acquisition by private lessees and relegated the role of the HHA to the purely ministerial function of acting as a conduit for transfer of title. For example, the original statute authorized the HHA to condemn only *entire* development tracts, but a 1975 amendment allows condemnation of only those lots which lessees have applied to purchase.[31] In 1976, probably recognizing that the fee simple residential properties are indeed readily available (notwithstanding "findings" to the contrary), the legislature deleted the requirement that the HHA find a shortage of fee simple residential properties before designating lots for acquisition.[32] In 1978, the legislature made it possible for lessee-speculators to take

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[26] The legislature recited that although the Act "has been in effect for nearly six years it has not been implemented for reasons including possible legal or constitutional difficulties * * *." 1975 Haw. Sess. Laws, Act 186, § 1.

[27] Haw. Rev. Stat. § 516-83(a)(1).

[28] Haw. Rev. Stat. § 516-83(a)(2).

[29] Haw. Rev. Stat. § 516-83(a)(7).

[30] Haw. Rev. Stat. § 516-83(a)(9).

[31] *Compare* Act 307, § 11 *with* 1975 Haw. Sess. Laws, Act 184, § 2(6) (codified at Haw. Rev. Stat. § 516-22).

[32] 1976 Haw. Sess. Laws, Act 242 § 2 (codified at Haw. Rev. Stat. § 516-22).

advantage of this statute by removing the requirement that the lessee-acquirer live on the lot to be condemned.[33]

C. The Present Federal Court Litigation

1. *Background*

The initial version of Chapter 516 was enacted as Act 307 in 1967.[34] For nearly a decade the statute lay dormant,[35] in part due to unanswered questions regarding its constitutionality,[36] and in part due to the continuance of low rents fixed at the inception of the lease terms.[37]

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[33] 1978 Haw. Sess. Laws, Act 140, § 2 (codified at Haw. Rev. Stat, § 516-33(2)). Another recent amendment substitutes mandatory negotiation of price for mandatory arbitration. This preserves the lessee's opportunity to withdraw before condemnation if the negotiations indicate he may be compelled to pay a price not to his liking. 1980 Haw. Sess. Laws, Act 107, § 3 (codified at Haw. Rev. Stat. § 516-51).

[34] 1967 Haw. Sess. Laws, Act 307 (hereinafter "Act 307").

[35] Prior to these proceedings, all actions under the purported authority of the statute were carried out by voluntary agreement among the lessors and the lessees (Preliminary Injunction Hearing, April 24-27, 1979 (Tr. at 217)).

[36] Act 307 gave the Hawaii Supreme Court original jurisdiction of suits questioning the statute's constitutionality. Trustees filed two such actions in 1967 (*Midkiff* v. *Hasegawa*, No. 4727, and *Midkiff* v. *McCormack*, No. 4728) and another residential lessor filed a similar action (*Davis* v. *Finance Realty*, No. 4735). The HHA and the State of Hawaii were defendants in the three suits. When the legislature rendered moot many of the questions raised, through statutory amendments designed to blunt the Complaints (1968 Haw. Sess. Laws, Act 46), the suits were dismissed without prejudice. Recognizing that the legislature could legislate faster than they could litigate, Trustees declined to seek judicial protection again until the statute was applied against them. Meantime, in 1975, the Hawaii Attorney General brought suit against the Hawaii Budget Director challenging the constitutionality of the statute on grounds, among others, that it provided for taking private property for non-public purposes. This suit, too, was dismissed without prejudice. *State* v. *Anderson*, Civil No. 43937 (Haw. Cir. Ct.).

[37] In most residential leases, rent is fixed for a period of 25 to 40 years, with rent for the remaining term to be renegotiated or

After a series of liberalizing amendments to improve the lessees' litigation position,[38] the HHA began proceedings in 1978 leading to the involuntary condemnation of Trustees' fee title in various lots. These included a direction by the HHA on January 22, 1979, that Trustees submit to mandatory arbitration for *prima facie* determination of the prices to be paid to Trustees by lessees in Tract H of the Waialae-Kahala subdivision in Honolulu for the taking of the fee simple title.[39] Trustees instead brought the present action for injunctive and declaratory relief.

2. *The proceedings below*

Trustees filed this suit on February 28, 1979, seeking a declaratory judgment that Chapter 516 is unconstitutional and an injunction against its enforcement.[40] The

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arbitrated at the end of the fixed rent period. Rents fixed in many household tracts developed shortly after World War II became less than nominal as land values increased. Thus, until these rents began to come up for renegotiation in the 1970's, there was no economic incentive for a lessee to abandon the rent bargain by purchasing the fee title.

[38] *See, e.g.*, notes 31-33 and accompanying text, *supra*.

[39] Decision on Motion for Preliminary Injunction (HHA JS App. A102 n.52). Trustees and the lessees in Tract H ultimately agreed upon a voluntary sale, and the Tract H Community Association withdrew its intervention in this lawsuit.

[40] Trustees' complaint asserted that the use of eminent domain for the taking of fee simple titles for transfer to lessees was solely for private use and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint also alleged that the statute does not vest power in the state or its agency, the HHA, to make the essential determination as to which, if any, lots should be taken; but, rather, unconstitutionally delegates that power to lessees. Further, it alleged that the statute contravenes the Contract Clause of the Constitution because it abrogates the terms of pre-existing lease contracts.

Finally the complaint asserted the unconstitutionality of the compensation and the compulsory arbitration provisions of the statute. These, as noted above, were held unconstitutional by the District Court and are not in issue before this Court.

District Court, on February 28, 1979, issued a Temporary Restraining Order against HHA enforcement of the Act (HHA JS App. A78 & n.5), which it modified, on March 27, 1979, so as to permit all procedural steps under the statute prior to mandatory arbitration and condemnation (*id.*). After a hearing on Trustees' motion for a preliminary injunction, the District Court handed down its decision on Trustees' motion on May 8, 1979 (HHA JS App. A77 *et seq.*). The preliminary injunction itself was entered on June 8, 1979. It permitted condemnation of the fee simple title to leasehold lots, but restrained compulsory arbitration and exclusive use of the valuation formulate provided by the statute.[41]

Thereafter, HHA and intervenors,[42] without claiming that abstention was appropriate for any reason, filed motions for partial summary judgment asking the District Court to uphold the constitutionality of the statute on the basis of the legislative findings. Without affording Trustees an opportunity to present any evidence to the contrary, the District Court filed its decision upholding the constitutionality of the statute.

The District Court's decision.[43] The District Court denied Trustees' demand for a trial of the disputed issues, reaffirmed its prior rulings concerning mandatory arbitration and the valuation formulae, and, subject to such rulings, granted summary judgment against Trustees, holding that the condemnations authorized by

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[41] There were no state court condemnation proceedings against Trustees even filed by this time. The first such suit was filed in September 1979. (HHA JS App. A30 (Poole, J.)).

[42] On March 23, 1979, the District Court granted motions of certain community associations, representing lessees, to intervene. Some of these associations later withdrew from the case after their members purchased the fee titles to their lots in negotiated transactions.

[43] The District Court's decision was embodied in its Amended Memorandum Decision on December 19, 1979 (HHA JS App. A64 *et seq.*).

Chapter 516 were for a public purpose. It held that compelling "redistribution" (HHA JS App. A.74)[44] of the lessor's property interests to lessees who elected to acquire them is within the state's police power, and "hence" the takings are for a public purpose and constitutional (HHA JS App. A67-A73). Alternatively, it held that if this conclusion was erroneous, the legislature's "economic findings" furnished an adequate basis for upholding the statute (HHA JS App. A74-A75).[45] Trustees appealed.

The Court of Appeals' decision. The Court of Appeals, by a divided vote, reversed. The court first concluded that the District Court had not erred by not *sua sponte* abstaining from decision on the merits of the Trustees' claims.[46] On the merits, the Court ruled that Chapter 516 violated the Public Use Clause because the Act did not foster any purpose other than to transfer land from one private party to another, and this purpose was barred by the Public Use Clause.[47] Because the Act simply mani-

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[44] The use of this phrase throughout the District Court's opinion is unwarranted. No "land" redistribution is involved. The lessees are in possession, and only the "fee simple" interest is "redistributed"—i.e., taken from the owner and transferred to those lessees who apply and pay therefor.

[45] Finally, the District Court granted the HHA and intervenors' motion for partial summary judgment, ruling against Trustees on the remainder of their constitutional claims. Final Judgment and Permanent Injunction, incorporating all rulings of the District Court, was entered on June 10, 1980.

[46] No one had seriously argued to the District Court or the Court of Appeals that abstention on the merits was required; the Ninth Circuit panel raised this issue on its own during oral argument (HHA JS App. A30 & n.7 (Poole, J.)). After receiving post-argument briefing on this issue, the Court of Appeals concluded that abstention would have been improper (HHA JS App. A2-A4 n.1; *id.* at A22-A31 (Poole, J.)).

[47] The Court of Appeals concluded: " ' "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain * * *. For if the use be not public

fested and promoted a state-adopted preference for private land ownership, Chapter 516 failed the requirements of the Public Use Clause.[48]

SUMMARY OF ARGUMENT

The Ninth Circuit's narrow holding that Chapter 516 violated the Public Use Clause of the Fifth and Fourteenth Amendments to the United States Constitution is manifestly correct and does not warrant further review by this Court. The court applied well-established precedent in two comprehensive opinions giving detailed consideration to all the arguments made below and repeated here by appellants. Thereafter, the full Court of Appeals denied *en banc* review. The court's application of the law to this particular statute does not warrant further review.

A. Chapter 516 is unique, without historical precedent or contemporary analogue. While every state faces the same population-land use problems caused by an expanding population and a finite territory (and some are in far worse straits than Hawaii), no other state has adopted a law comparable to this one. The issues in this case therefore are unique and cannot be expected to recur. Moreover, the Court of Appeals' resolution of those issues did not establish a new principle of law. To the contrary, that decision is a straightforward application of well-settled precedent to this unique statute. Therefore, the Ninth Circuit's decision will have no impact beyond the narrow confines of this particular statute and these facts.

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* * * the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required" '" (HHA JS App. A20, quoting *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 252 (1905), quoting in turn *Tracy* v. *Elizabethtown, Lexington & Big Sandy R.R.*, 80 Ky. 259, 265 (1882); *see id.* at A33 (Poole, J.), quoting *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937)).

[48] Because of the court's ruling, it did not consider Trustees' other arguments.

The Ninth Circuit's ruling, furthermore, does not conflict with any decision of this Court or any other federal Court of Appeals. The Ninth Circuit faithfully observed this Court's decisions, and gave close consideration to the judgment made by the Hawaii legislature as to the need for this statute and to the alleged purposes served thereby. Contrary to appellants' suggestions, the Ninth Circuit did not overlook or undervalue any of these matters. It simply concluded that Chapter 516 did not square with this Court's decisions and with the principle, consistently expressed in those decisions, that the Public Use Clause does not permit a state simply to transfer property from one private party to another, notwithstanding payment of just compensation. Because appellants have not argued (and could not do so consistently with this Court's decisions) that such a transfer is constitutionally permissible, there is no need for full, plenary review of the Court of Appeals' application of that rule to this statute.

B. Finally, Trustees also presented several Due Process and Contract Clause arguments to the Court of Appeals, which that Court found unnecessary to consider, but each of which independently supports the judgment of that court. Because any one or all of these grounds would require affirmance, further review of the Court of Appeals' decision is unnecessary.

ARGUMENT

So as not to unduly burden the Court, Trustees will not repeat here the Argument already made in their Motion to Affirm in No. 83-236 with regard to the correctness of the ruling below on abstention. The Argument is instead incorporated herein by reference. Trustees will address in this Motion only appellants' arguments relating to the constitutionality of Chapter 516.

I. THE COURT OF APPEALS' NARROW DECISION IS MANIFESTLY CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS ON PUBLIC USE

1. The Eminent Domain Clause of the Fifth and Fourteenth Amendments prohibits the "tak[ing]" of private property, even when accompanied by payment of "just compensation," unless the taking is for a "public use."[49] The Public Use requirement therefore makes certain condemnations forbidden, even where the government is willing to pay for them. Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351, 365. In so doing, that requirement not only protects individuals' property rights from government depradation—protection long regarded as "a vital principle of republican institutions" (*Chicago, Burlington & Quincy R.R.*, 166 U.S. at 235-236)—but also assures that one group of citizens does not capture governmental power for its own benefit at the expense of other individuals (*see Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.)).

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[49] The Eminent Domain Clause provides that "nor shall private property be taken *for public use*, without just compensation" (U.S. Const. amend. V; emphasis added), and is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *E.g., Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897). Hereafter, we shall use the term the "Eminent Domain Clause" to refer to the entire quoted provision, the "Public Use requirement" to refer only to the italicized portion, and the "Just Compensation requirement" to refer to the last portion of the Clause.

For these reasons, the Public Use requirement of the Eminent Domain Clause forbids the State from transferring property from *A* to *B* for *B*'s private use and benefit, even though just compensation is paid. That principle, as the Court of Appeals recognized, is clear from the text of the Clause itself,[50] from its historical background,[51] and from the decisions of this Court[52] (HHA

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[50] By its terms, the Public Use requirement recognizes as valid only those takings serving a public, not a private, use. *See* Epstein, *supra*, 1982 Sup. Ct. Rev. at 365. Any other interpretation—such as that the requirement is merely precatory, or that it limits only those instances in which just compensation must be paid—either renders the Public Use requirement superfluous or makes the Just Compensation requirement virtually worthless. Both interpretations, however, are fatally inconsistent with black-letter constitutional law requiring every word and phrase in the Constitution to be given effect. *E.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 333-336 (1816) (Story, J.).

[51] *See* authorities cited in Judge Alarcon's opinion for the Court of Appeals, at HHA JS App. A5-A10.

[52] *See, e.g.*, *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937); *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905); *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U.S. 403, 417 (1896); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 159 (1896); *Cole* v. *LaGrange*, 113 U.S. 1, 7 (1885); *Olcott* v. *Supervisors*, 83 U.S. (16 Wall.) 678, 689 (1873); *see also United States* v. *Carmack*, 329 U.S. 230, 239 (1946); *Brown* v. *United States*, 263 U.S. 78, 84 (1923); 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 7.1, at 7-4.1, §§ 7.1[1] & [2] (rev. 3d ed. 1981 & Supp. 1982); Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 595 (1972).

Moreover, this limitation, as the text states (*see* note 50, *supra*), is independent of the requirement that any taking be accompanied by "just compensation." *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. at 80; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. at 252. In fact, this Court's decision that the Fourteenth Amendment Due Process Clause incorporated the Fifth Amendment Just Compensation requirement so held only after reaffirming the Court's prior rulings that a State could not take private property without satisfying the Public Use Clause. *Compare Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. at 235-236 (Public Use requirement limits State's eminent domain authority) *with id.* at 241 (Just Compensation requirement requires the State to pay for otherwise lawful takings).

JS App. A5-A20; *id.* A33-A34 (Poole, J.)). Therefore, it is hardly surprising that, for over a century, this Court has consistently reaffirmed the principle that, as Justice Brandeis once acknowledged for the Court, "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. at 80; *see* cases cited in note 52, *supra*.

To be sure, the concept of a legitimate "public use" has expanded over the years so as to include objectives benefitting the public as a whole, rather than simply uses of property accomplished entirely by the government. *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700 (1923). But whether the test is phrased in terms of use by or for the public, the taking of property from one to give it to another cannot be constitutionally justified.[53] The taking must clearly and persuasively be for the benefit of the public, and it must affect the use of the land in some way which serves a public purpose.

The only question, then, is whether the Court of Appeals properly applied that principle to this specific statute. In this case, the court correctly concluded that, notwithstanding the alleged interests HHA and the intervenors have advanced in support of Chapter 516, the unmistakeable purpose and unquestionable effect of that Act is precisely what the core principle of the Public Use requirement forbids.

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[53] Whether the test is stated as public-use or public-purpose, there is one thing about which American courts have always said they were adamant. *Eminent domain cannot be used to transfer property from one private person to another.* That would violate the most fundamental Lockeian principle that governments were instituted to protect every man's property against his neighbor's depradations. [Stoebuck, *A General Theory of Eminent Domain*, *supra*, 47 Wash. L. Rev. at 595 (emphasis added); *see generally* 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, *supra*, § 7.2.]

2. Judge Poole pinpointed the central flaw in Chapter 516 when he noted that "the only variable presented is whether A or B holds title to the land * * *" (HHA JS App. A38). While the Court of Appeals' interpretation of the Act is entitled to substantial deference,[54] that conclusion is evident from the text of the Act itself. The Act neither provides for, requires, presupposes, nor envisions any change of any sort in the possession of the acquired leaseholds or the use to which the acquired leaseholds or their environs will be put. In addition, the Act imposes no restrictions upon a lessee's right after acquiring the property, in turn, to lease his home and newly-acquired property, notwithstanding the state's professed interest in eliminating leaseholds on this land. In other words, all that the Act potentially accomplishes is to trade one lessor with 100 separate leases each for 55 years, for 100 lessors each with one lease for 55 years. The condemnations authorized by the Act, furthermore, may take place only at the behest of the private beneficiaries thereof who may be animated by nothing more than a naked desire to expropriate the lessor's title.[55] Finally, the legislative history of the Act exposes its true objective as being simply a vehicle "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots."[56] Accordingly, unless the Public Use requirement is to be excised from the text of the Fifth Amendment, the Court of Appeals' ruling must be upheld.

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[54] *See, e.g., Pacific Gas & Elec. Co.* v. *State Energy Resources Conserv. & Dev. Comm'n*, 103 S. Ct. 1713, 1727 (1983).

[55] That the takings authorized by Chapter 516 can occur only where the private beneficiaries thereof set the process in motion is independently significant in determining whether a taking satisfies the Public Use requirement. *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896).

[56] Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859.

3. Nothing in appellants' argument comes to grips with that conclusion. Instead, appellants have attempted to deflect attention from the Public Use requirement, its historical background, and underlying policies, to the doctrine of substantive due process by casting Chapter 516 as a garden variety regulatory measure. From that vantage, appellants then castigate the Court of Appeals' decision as an attempt to disinter *Lochner* v. *New York*, 198 U.S. 45 (1905). In both instances, however, appellants' attempt to avoid the teaching of this Court's Public Use decisions must fail.

(a) Of the 24 decisions by this Court cited by appellants on the taking issue (as opposed to abstention), 16 are not even eminent domain cases. As support for the argument that the redistribution by eminent domain of property from *A* to *B* is wholly acceptable, HHA relies (HHA JS 15-19) upon cases such as *Miller* v. *Schoene*, 276 U.S. 272 (1928), in which this Court held no taking had occurred. This reliance fails to recognize the crucial distinction between government regulation and government condemnation. The redistribution through *regulation* of the wealth or property of one group for the benefit of another need not satisfy the Public Use (or Just Compensation) requirements precisely because regulation falling short of a taking does not engage the requirements of the Eminent Domain Clause *at all*. Only "takings," not regulation, must satisfy the requirements of the Eminent Domain Clause.

Appellants' argument also attempts to resurrect the position rejected in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 417 (1922), that "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking" (Brendeis, J., dissenting). The principle adopted in *Mahon*, and often reiterated since, is "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. That principle, dividing regulatory legislation not subject to the requirements of the

Eminent Domain Clause from those actions which are, has been reaffirmed in three different contexts within the last few years. *See United States* v. *Security Indus. Bank*, 103 S. Ct. 407, 410 (1982) (Eminent Domain Clause limits Congress' authority under Bankruptcy Clause); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982) (Eminent Domain Clause limits state's police power); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-73 (1979) (Eminent Domain Clause limits Congress' authority under the Commerce and Admiralty Clauses).[57]

(b) Appellants further contend that the majority gave insufficient weight to the unique history and policy considerations supporting Chapter 516.[58] But appellants

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[57] HHA's reliance (HHA JS 13) upon *Wilson* v. *Iseminger*, 185 U.S. 55 (1902), and *Stewart* v. *Gorter*, 16 A. 644 (Md. 1889), as support for this argument is misplaced. In neither case did the statute "take" any property. The Pennsylvania statute in *Wilson* decreed that, if no demand for rent had been made for 21 years, release of the lessor's reversionary interest was presumed. As this Court, in discussing *Wilson*, recognized two Terms ago in *Texaco, Inc.* v. *Short*, 454 U.S. 516, 527-530 (1982), the transfer of property after the owner has abandoned it does not constitute a "taking" under the Eminent Domain Clause. *See* 454 U.S. at 530 ("It is the owner's failure to make any use of the property—and not any action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation"). Similarly, the Maryland statute at issue in *Stewart* simply provided that where a lessor *in subsequently executed leases chose* to lease the land for more than 15 years, the leases would be subject to a tenant's right to purchase the reversion. The wholly prospective operation of that statute renders *Stewart* materially different from this case. In fact, the Maryland Court of Appeals later ruled that a retroactive change in already-executed leases would violate the Contract Clause, and limited *Stewart* to prospective leases only. *See Marburg* v. *Mercantile Bldg. Co.*, 140 A. 836, 839 (Md. 1928). Finally, that Acts of this type may be a valid exercise of the State's police power does not insulate them from challenge under the Eminent Domain Clause. *See Security Indus. Bank*, 103 S. Ct. at 410; *Loretto*, 102 S. Ct. at 3171; *Kaiser Aetna*, 444 U.S. at 172-173.

[58] Contrary to appellants' suggestions, a legislature's or state court's declaration of "public use" and its "findings" that various

have confused the weight to be given legitimate state interests with the legitimacy of those interests themselves.[59] HHA's and intervenors' after-the-fact rescue attempt to impact a public use to this Act overlook the essential purpose and effect of the Act and focuses, instead, on the ancillary benefits that the state hopes to attain from its operation. That approach stands the Public Use requirements on its head by permitting any condemnation—even those unabashedly intending simply to transfer property from *A* to *B*—so long as some incidental benefit therefrom allegedly flows to the state or public. That has never been the law, and appellants' roundabout effort to have this Court adopt such a principle ignores the text, history, and purpose of the Public Use requirement, as well

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economic and social benefits will follow from a particular exercise of the state's eminent domain power are manifestly not conclusive upon a federal court. To the contrary, this Court has consistently emphasized that, despite the deference due such judgments, the "public use" question is a judicial one, which must independently be determined by a federal court in order for the state's condemnation to pass muster. *E.g.*, *Cincinnati* v. *Vester*, 281 U.S. 439, 446-447 (1930); *Rindge Co.* v. *County of Los Angeles*, 262 U.S. at 705-706; *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. 598, 606 (1908); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. at 159; *see also* 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, *supra*, § 7.4.

[59] We question whether HHA may even advance interests such as the need to avoid "consequent disruptions in lawful social behavior" (Haw. Rev. Stat. § 516-83(7); HHA JS App. A138) in support of the Act's constitutionality. It is, of course, beyond question that a party may not be forced to sacrifice his federal constitutional rights simply to keep a mob at bay. As a unanimous Court held when presented with a similar argument, "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. * * * '[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.'" *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) (citation omitted); *cf. Loretto*, 102 S. Ct. at 3178 n.17 (" a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation").

as this Court's decisions interpreting its reach (HHA JS App. A5-A20; pages 16-19, *supra*, and cases cited therein).[60]

(c) The Ninth Circuit's decision does not conflict with any decision of this Court or any other Court of Appeals.[61] As the court noted (HHA JS App. A16-A19; *id.* A34 (Poole, J.)), its holding that Chapter 516 did not fulfill a valid public purpose is in accord with this Court's ruling in *Berman* v. *Parker*, 348 U.S. 26 (1954), as well as the other cases cited by appellants (*e.g.*, HHA JS 20-21).[62] None of these decisions undermined this

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[60] Appellants repeatedly (albeit obliquely) make reference to the fact that Hawaii is an island to buttress their argument that the peculiar conditions prevailing there justify Chapter 516. But the fact that Hawaii is surrounded on all sides by the Pacific Ocean rather than on one side (like Oregon), or rather than being landlocked (like Utah) adds nothing to the fact that Hawaii, like *every* state, has a fixed and finite amount of territory. In fact, other states have far worse population-land use problems than Hawaii, such as Nevada where 86.5% of the land is *federally* owned (excluding Indian reservations and other federal trust properties) and therefore not subject to the state's eminent domain power, with much of the remaining land uninhabitable because of water scarcity. *United States* v. *New Mexico*, 438 U.S. 696, 699 n.3 (1978).

In any event, just as there is not one law for Athens and another for Rome, surely there is not one Eminent Domain Clause for the Hawaiian Islands and another for Manhattan Island. A statute simply transferring land from *A* to *B* for *B*'s private use and benefit is as unconstitutional in the one case as in the other.

[61] Appellants' challenge to the Court of Appeals' distinction between federal and state exercise of eminent domain is irrelevant to this case because Trustees have never challenged any federal condemnation. What the appropriate standard is for federal takings must await a federal condemnation proceeding.

[62] The Court of Appeals did not overlook any decision of this Court and discussed at length every case cited by appellants. In so doing, the Court of Appeals correctly noted that none of the takings considered in any of the cases cited by appellants had as tenuous (or imaginary) a connection with any legitimate public purpose as does Chapter 516 (HHA JS App. A12-A20; *id.* A33-A34

Court's earlier rulings that the simple transfer of property from *A* to *B* for *B*'s private use and benefit is not a *legitimate* public purpose, however rationally that goal is advanced by the applicable legislation. The Court of Appeals' factual finding here therefore does not conflict with any of this Court's rulings.[63]

While appellants point to dicta in *Berman* as supporting their position, the facts of that case actually demonstrate the extraordinary difference between what the Court was ruling upon there and what appellants would have the Court rule here. In *Berman* (a) *all* of the property that was taken was commercial property, (b) the taking was pursuant to a comprehensive, cohesive public plan, (c) the purpose of the taking was to redevelop a

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(Poole, J.)). And the historical materials cited by HHA (HHA JS A12-A13) refer to entirely different statutes, enacted over 100 years ago, that have since passed into obscurity. Further review is unnecessary to consider this material.

[63] The Ninth Circuit's ruling here also does not conflict with the ruling in *People of Puerto Rico* v. *Eastern Sugar Assoc.*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946). Like the Court of Appeals here, the First Circuit recognized that "a taking of property from one, for the purpose of transferring it to another, without anything more, [does not] conform to due process of law" (156 F.2d at 323, citing *Brown* v. *United States*, 263 U.S. at 84). There was, in that case, a change not only of possession but of use. 156 F.2d at 319, 323.

Appellants also claim that the decision below conflicts with *Guam* v. *Moylan*, 407 F.2d 567 (9th Cir. 1969), and *Poletown Neighborhood Council* v. *City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (*per curiam*). *Moylan* involved an attempt to "establis[h] order out of the chaos" (407 F.2d at 568) created during World War II by the heavy bombing of Guam's capital city during the American invasion of the island, after which "little was left standing in the harbor area." *Id.* at 567. That decision, from the same Circuit that decided this case, is not remotely pertinent to this case. And the court in *Poletown* acknowledged that "condemnation for a private use cannot be authorized whatever its incidental public benefit" (410 Mich. at 634, 304 N.W.2d at 458), which was the precise holding below. The decision below therefore does not conflict with either of these decisions.

large area in order to eliminate and prevent slum and substandard housing conditions, (d) the property was actually taken by the Government and then resold or leased, and (e) the reselling or leasing was subject to carefully drawn conditions designed to accomplish the purposes of the anti-slum Act. *None* of these five factors is present in the instant case.

II. THE COURT OF APPEALS' JUDGMENT IS INDEPENDENTLY SUPPORTED BY SETTLED DUE PROCESS AND CONTRACT CLAUSE DOCTRINE.

In addition to the argument that Chapter 516 violated the Public Use requirement of the Eminent Domain Clause, appellees raised several other separate grounds for the same result before the District Court and Court of Appeals.[64] Although the Court of Appeals found it unnecessary to reach these issues, each independently supports its judgment. Further review is therefore unnecessary for these reasons as well.

A. The Due Process Clause

1. The Due Process Clause forbids the State from subjecting a party's already-recognized property rights to "so arbitrary a thing as taste" (*Eubank* v. *City of Richmond*, 226 U.S. 137, 144 (1912)) by delegating to private parties the right arbitrarily to interfere with another's lawful use of his property. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 121-122 (1928); *Eubank*, 226 U.S. at 143-144.[65] The Court of

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[64] *See* Appellants' Opening Br. 33-46; Appellants' Reply Br. 19-23; Record Excerpts in the Court of Appeals 255, 260-65, 267-73.

[65] Stressing the intrusive and standardless character of such a delegation, *Eubank* struck down a local zoning ordinance delegating to the owners of two-thirds of the property abutting an affected street the power to set building lines. 226 U.S. at 143-144. *Eubank* was later followed in *Roberge*, which invalidated a similar delegation for the same reasons. 278 U.S. at 121-122.

As we have already pointed out (page 19, *supra*), this delegation of indiscriminate and standardless eminent domain power fatally

Appeals correctly recognized that Haw. Rev. Stat. § 516-22 [66] delegates to lessees essentially the same absolute and standardless state power found constitutionally unacceptable in *Eubank* and *Roberge*.[67] Although the Ninth Circuit did not have to reach this Due Process issue in its decision,[68] it is difficult to imagine a stronger case for application of those decisions than this one. Trustees' current use is manifestly entitled to due process protection,[69] and the power delegated by the Act to private parties entitles them to expropriate Trustees' fee simple title rather than merely regulate their use thereof as in *Eubank*, while blessing this expropriation as a proper public use (*see* No. 83-236 Motion to Affirm, pp. 12-14).[70]

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undermines appellants' claim that the Hawaii laws serve a legitimate public purpose. That same flaw also renders these laws invalid under *Eubank*.

[66] Section 516-22 provides, in part, that "[HHA] may designate all or a portion of a development tract for acquisition and acquire leased fee interests * * * *after* twenty-five or more lessees or the lessees of more than fifty percent of the residential lease lots within the development tract, whichever is the lesser, have applied to the authority to purchase the leased fee interest * * *" (HHA JS App. A118-A119; emphasis added). *See* page 6, *supra*.

[67] HHA JS App. A32 ("[u]nder [§ 516-22], the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase"; Poole, J.).

[68] Had it done so, its characterization of Section 516-22 strongly suggests that it would have found *Eubank* controlling. *See* note 67, *supra*.

[69] Trustees' right, as a legitimate incident of ownership, to rent their property rather than sell is unquestionably entitled to constitutional protection. *See Roberge*, 278 U.S. at 121 ("[t]he right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution"). Even Chapter 516 recognizes the legitimacy of such leasing; not only are the current leases undisturbed until a lessee seeks condemnation, but the Act does not bar the lessees from adopting the same leasing scheme as now exists.

[70] That compensation is awarded cannot rehabilitate the patent due process violation in this case because (1) "it is the state system

2. State laws regulating land use, like all state legislation, must rationally further a legitimate state interest. *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928); *see Moore* v. *City of East Cleveland*, 431 U.S. 494, 514, 520-521 (1977) (Stevens, J., concurring in the judgment). These laws clearly fail that test. Of the purposes set forth in the statute (Haw. Rev. Stat. § 516-83)—to combat inflation, to satisfy the lessees' desires to own the fee simple title to their property, and to attack an alleged concentration of land ownership—only the first reason is legitimate, and the legislature's finding that transferring title will combat inflation is baseless as a matter of law or economics.[71] The latter two reasons, while rationally (even brutally) served by this legislation, manifest that the real and substantial purpose and effect of this statute are to do nothing more than transfer fee simple title from *A* to *B* for *B*'s private use and benefit (*see* HHA

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itself that destroys a [lessor's] property interest, by operation of law * * *" (*Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982)), rather than "a random and unauthorized act by a state employee * * * not a result of some established state procedure" (*Parratt* v. *Taylor*, 451 U.S. 527, 541 (1981)); and (2) there is no " 'necessity of quick action by the State' " or any " 'impracticality of providing any predeprivation process.' " *Logan*, 455 U.S. at 436, quoting *Parratt*, 451 U.S. at 539. That HHA, under a different, properly-drawn statute, could itself make the judgment as to where and when condemnation proceedings should go forward is, of course, no answer. " 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' " *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972) (citation omitted).

[71] Unless the Hawaii legislature can alter the economics of supply and demand, transferring title cannot hope to lessen or cap inflation. The statute will not add a foot of land or a single house to the supply; it will not restrict the lessees' ability to lease or sell to others at whatever price they choose; and it will not provide for, and is not conditioned upon, the acquisition of title to a large enough group of lots, either in the aggregate or in any classification, to achieve any supposed anti-inflationary effect.

JS App. A21).[72] As that purpose is barred by the Public Use requirement of the Eminent Domain Clause (pages 17-18, *supra*), Chapter 516 plainly embodies nothing more than "a bare [state] desire to harm a politically unpopular group" which "cannot constitute a *legitimate* governmental interest." *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *see Zobel* v. *Williams*, 457 U.S. 55, 62-64, 65 (1982).

B. The Contract Clause

Chapter 516 authorizes each lessee, through the instrumentality of the state's condemnation power, to elect to terminate his lease agreement by acquiring, over the lessor's objection, the lessor's reversionary interest.[73] As such, Chapter 516 violates the Contract Clause by insulating the lessees from their destruction of already-established private contracts. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977). In *Allied Structural Steel* and *United States Trust Co.*, this Court concluded that state laws modifying already-existing private contract rights violated the Contract Clause, notwithstanding the deference due state economic legislation.[74]

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[72] If any further confirmation of that fact were needed, it can be found, as Judge Poole did (HHA JS App. A32-A33; *see id.* A36), in the fact that the statute imposes absolutely no restriction upon a lessee's post-acquisition ability to engage in the same form of long-term leasing that the legislature has declared to be so harmful.

[73] Section 516-61 states that "[e]xcept as otherwise expressly provided, this part applies to all leases of residential lots existing and in force on June 24, 1967, and to all leases of residential lots executed thereafter. [¶] Notwithstanding any term, condition, or provision in any lease to the contrary, the lessee of a residential lot shall have all of the rights enumerated in this part" (HHA JS App. A132).

[74] *Compare Exxon Corp.* v. *Eagerton*, 103 S. Ct. 2296 (1983); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 103 S. Ct. 697 (1983).

All of the determinative factors identified in these cases are fully applicable here.[75] By retrospectively vesting lessees with the right to terminate both the contract in existence at the time of the initial application of the statute and the lessors' reversionary interests, Chapter 516 plainly violates the Contract Clause.

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[75] Chapter 516 (1) operates as a substantial impairment of contractual relationships (*Energy Reserves*, 103 S. Ct. at 704-705; *Allied Structural Steel*, 438 U.S. at 244-245); (2) it favors a narrow class, in derogation of the interests of a politically unpopular group (*Energy Reserves*, at 705; *Allied Structural Steel*, at 248-249 *see also Eagerton*, 103 S. Ct. at 2306); (3) it is not justified by a "broad and desperate emergency" situation, as was the case during the Great Depression (*cf. Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934)) justifying retroactive application of the Act (*Allied Structural Steel*, 438 U.S. at 249); (4) the Act imposes conditions that are not appropriately tailored to meet the emergency (*Blaisdell*) because lessees are free to impose the same restraints after their acquisition of the leasehold; and (5) the Act was designed to favor the State (*Energy Reserves*, 103 S. Ct. at 705-706 n.14; *United States Trust Co.*, 431 U.S. at 25-26) by freeing it from the obligation to meet its self-professed goals of guaranteeing housing to middle- and low-income residents, and the elderly, through government-operated public housing facilities.

CONCLUSION

For the foregoing reasons and for the reasons given in our Motion to Affirm in No. 83-236, the judgment of the Court of Appeals should be affirmed. Should this Court instead note probable jurisdiction, the Court should do so only with respect to the Public Use Clause question presented by appellants, for the reasons given in our separate Motion to Affirm in No. 83-236 regarding abstention.[78]

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[78] Should the Court decide to give plenary review to these cases, Trustees will of course raise the alternative grounds for affirmance noted above.